

A Legal View: Hostile Use of Land Can Create a Prescriptive Easement
and Loss of Exclusive Use.

by Craig B. Forry, Esq.

Q: For a long time, my neighbor has used a trail across my backyard, even though I repeatedly told him he was trespassing. He recently told me that he would continue to use the trail and there was nothing I could do about it. Is he right, and what can I do to prevent his use of the trail?

A: There are many types of real property concepts that have continued since the middle ages, but a prescriptive easement is one of the more egregious types because it enables a person who is not an owner and who has repeatedly trespassed despite objections, to have the right to use the land together with the rightful owner. Once established, the prescriptive easement lasts forever, and must be disclosed as a cloud on the title to the property that can reduce the value of the property. Therefore, an owner must be vigilant when another person is repeatedly using the land.

An easement is the right to use another person's land, along with the owner, and it is an enforceable right in the land of another. The land that the easement is on is often termed the servient tenement, and the land that is benefited by the easement is termed the dominant tenement.

A prescriptive easement can be created when the owner of land does not exercise his right to bar the use by another for a certain period of time. Its creation requires use of the land continuously for a period of five years, in a manner that was open, notorious, and clearly visible to the owner of the burdened land, and was used in a hostile and adverse manner to the owner.

The claimant can file a legal action to have a jury determine whether all of the necessary factors have been proved. The claimant has the burden of proof to show all of the factors for a prescriptive easement have been satisfied based upon all of the relevant circumstances, such as the nature of the use, the relationship of the parties, the location of the properties, and other circumstances.

However, recent cases have held that the use of the easement by a claimant over a long period of time that is not prevented by the owner creates a presumption of the existence of an easement. A presumption in the law can shift the burden from the claimant to the owner, so that the owner then has the burden of proving that no easement was created.

The ironic nature of a prescriptive easement is that its creation depends upon the claimant repeatedly trespassing, despite the protests of the owner. Even though the claimant trespasses, the law imposes a duty on the owner to prevent the trespass to preserve his sole ownership of the land.

The typical examples are a trail or road across land, or the building of a fence or other structure on the servient tenement, but a prescriptive easement can arise out

of a trespass of the air rights of land, such as over flights by a plane, or even repeated noise, odors or fumes, that never actually touch the surface of the land.

Although similar to adverse possession, a prescriptive easement does not enable the claimant to exclude the owner from the continued use or ownership of the land. The main difference between the two rights is that adverse possession requires payment of the real property taxes assessed against the land for the required five years, and

An important factor regarding the adverse use is that it must be continuous and without interruption for the five year period. It is not sufficient to stack short, intermittent periods of adverse use; the use must be for an uninterrupted five years. A frequent way to prevent the continuous use is to erect a fence or wall that bars the claimant's use. Once the claimant's use is interrupted, a new five year period begins.

A road or trail does not need to be used everyday, and use once or more a week, or several times a month is sufficient. The use by the claimant does not have to be exclusive, and a prescriptive easement can be created even though the owner continues to use the same trail or road as the claimant.

The claimant's use must be visible, open and notorious so that the claimant's use of the easement is apparent and provides sufficient notice to the owner that his land is being crossed or used by the claimant.

The claimant's use must also be hostile and adverse to the owner and under a claim of right to use the owner's land. The intent of the claimant to use the easement adversely to the owner must be communicated to the owner. The owner's repeated protests or objections to the claimant's use actually assists the claimant in proving the easement.

One of the easiest ways to prevent a prescriptive easement is for the owner to give permission to the claimant's use, by letter or even a sign. If the owner gives permission to the claimant, then no prescriptive easement can result because the use was not hostile and adverse. But once the owner has notice of an adverse use, and does not prevent the use, then the five year period begins to run.

The repeated adverse use and trespass of an owner's land over several years should not be ignored because such use can ripen into a prescriptive easement. Professional advice of an attorney specializing in real estate law should be obtained whenever an owner suspects the adverse use of his land. Delay in enforcing an owner's rights may result in the loss of the exclusive use of the land, and a prescriptive easement that must be disclosed during any sale.

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